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**Datasheet for the decision  
of 29 April 2014**

**Case Number:** T 0221/12 - 3.3.01

**Application Number:** 05002011.4

**Publication Number:** 1563734

**IPC:** A01N43/90

**Language of the proceedings:** EN

**Title of invention:**

Method of improving turfgrass quality

**Patent Proprietor:**

Bayer CropScience LP

**Opponents:**

Suncor Energy Inc.  
Syngenta Limited

**Headword:**

Turfgrass improver/BAYER

**Relevant legal provisions:**

EPC Art. 123(2), 84

**Keyword:**

Main request and auxiliary request 1:  
Amendments - added subject-matter (yes)  
Auxiliary requests 2 to 13:  
Lack of clarity due to an amendment with respect to the claims  
as granted

**Decisions cited:**

G 0009/91, T 1469/10

**Catchword:**



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Case Number: T 0221/12 - 3.3.01

**D E C I S I O N  
of Technical Board of Appeal 3.3.01  
of 29 April 2014**

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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
13 December 2011 concerning maintenance of the  
European Patent No. 1563734 in amended form.**

**Composition of the Board:**

**Chairman:** A. Lindner  
**Members:** C. M. Radke  
D. Rogers

## Summary of Facts and Submissions

I. The two oppositions filed against European patent No. 1 563 734 were directed against the patent in its entirety and were based on grounds under Article 100 (a) (alleged lack of novelty and inventive step) (b) and (c) EPC.

II. The only independent claim of the patent as granted reads as follows:

"1. A method of improving the density, uniformity and/or greenness of turfgrass comprising applying an effective amount of the composition containing a copper phthalocyanine to the turfgrass, with the provisos that (i) the composition does not include an effective amount of phosphorous acid or a salt thereof or a monoalkyl ester of phosphorous acid or a salt thereof, and (ii) the composition does not include an effective amount of metallic ethylene bisdithiocarbamate contact fungicides."

III. Opponent 1 is the sole appellant against the interlocutory decision of the opposition division that the patent as amended based on claims 1-5 filed by telefax on 30 April 2010 meets the requirements of the EPC.

Claim 1 of this set of claims differs from the one as granted in that "density, uniformity and/or greenness" was replaced by "density, uniformity **and** greenness".

IV. The documents cited during the opposition procedure include the following:

- (D1) Application EP 05 002 011.4 as originally filed
- (D32) K. N. Morris, A Guide to NTEP Turfgrass Ratings, <http://www.ntep.org/reports/ratings.htm>, four pages, retrieved on 4 November 2011
- (D36) "Heat stress study using Greenzit pigment", five pages (including two pages of coloured photographs), enclosed as annex ALB3 with appellant's letter dated 5 November 2011

V. The documents additionally filed during the appeal proceedings comprise the following:

- (D38) First declaration of Jun Liu of 19 April 2012 two pages, enclosed as annex FR2 with appellant's letter dated 23 April 2012
- (D39) Second declaration of Jun Liu of 19 April 2012 two pages, enclosed as annex FR3 with appellant's letter dated 23 April 2012
- (D46) J. V. Krans and K. Morris, Determining a Profile of Protocols and Standards used in Visual Field Assessment of Turfgrasses: ..., Applied Turfgrass Science, 30 November 2007, Plant Management Network, six pages
- (D47) G. L. Horst et al., Agronomy Journal, vol. 76, July-August 1984, 619-622
- (D49) Declaration of Thomas W. Rufty, not dated, two pages, enclosed as Annex D46 with respondent's letter dated 28 March 2014.

VI. The claims on file are those of the main request and of auxiliary requests 1-13, all filed under cover of a letter dated 28 March 2014.

- a) Claim 1 of the main request and of auxiliary request 1 are identical with the one maintained by the opposition division (see point III above).

- b) Claims 1 of auxiliary requests 2 to 13 differ from the one of the main request in that
- "A method of improving the density, uniformity and greenness of turfgrass"
- was replaced by
- "A method of improving the turfgrass quality, where the turfgrass quality is visually rated at the scale 0 to 9 according to density, greenness and uniformity of the grass, with 0 being worst and 9 being best,".
- In addition, auxiliary requests 3 to 13 contain further amendments to claim 1.

VII. The arguments of the appellant (opponent 1), as far as relevant for this decision, may be summarised as follows:

*Main request and auxiliary request 1*

Claim 1 of the main request and of auxiliary request 1 required that all three properties (the density, uniformity and greenness) were improved. Page 7, lines 31-33, of the application as filed (D1) could not serve as a basis for this amendment as these lines indicate only that these three properties were rated, not that all of them were to be improved. Moreover, figure 9 showed that no improvement in tiller density was achieved with respect to the closest prior art. Hence, these claims contravened the requirements of Article 123(2) EPC.

*Auxiliary requests 2 to 13*

The feature "where the turfgrass quality is visually rated at the scale 0 to 9 according to density,

- greenness and uniformity of the grass with 0 being worst and 9 being best" rendered claim 1 of auxiliary requests 2 to 13 unclear. In particular there was
- no basis of comparison for the claimed improvement;
  - no indication as to how the single ratings were to be merged into a single turf quality rating;
  - no guidance on what was supposed to be a rating 9 (best) or of 0 (worst), as is evident from documents (D32), (D46) and (D47) (where document (D32) taught that different scales might be used which yield different ratings).

Finally, the visual rating was subjective and thus not reproducible.

VIII. The arguments of the respondent (patent proprietor), as far as relevant for this decision, may be summarised as follows:

*Main request and auxiliary request 1*

The amendments had a proper basis in the application as originally filed. The term "density, uniformity and greenness of turfgrass" had a basis in original example 1 (see (D1), page 7, lines 31-33)); the examples show that indeed all three properties were improved. That "copper phthalocyanine" was the preferred phthalocyanine was disclosed on page 2, lines 24-25. Both of these features were disclosed in combination in example 1 A of the application as filed. Figure 9 does not refer to example 1 A but to example 1 I. It was evident from the declaration (D49) that the person skilled in the art understood from page 7, lines 31-33, that the density, uniformity and greenness had to be improved simultaneously.



*Auxiliary requests 2 to 13*

The rating of the turfgrass quality was objective as it was made in comparison with the closest prior art. The appellant had used this type of rating in the experiments (D36), (D38), and (D39) without difficulty and apparently in a reproducible manner. The fact that document (D32) teaches that different scales may be used was not relevant as each of these scales uses a rating from 0 to 9. As document (D1) does not teach to the contrary, it is evident that the turfgrass quality was determined by taking the arithmetic mean of the ratings of density, greenness and uniformity.

- IX. The arguments of the party as of right (opponent 2) were not relevant for this decision.
  
- X. The appellant (opponent 1) requested that the decision under appeal be set aside and that the European patent No. 1 563 734 be revoked.

The respondent (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims of the main request, or alternatively upon the basis of any of the auxiliary requests 1 - 13, all filed under cover of a letter dated 28 March 2014.

The party as of right, (opponent 2), neither formulated any requests nor attended the oral proceedings before the board.

- XI. The chairman announced the decision of the board at the end of the oral proceedings.

## Reasons for the Decision

1. The appeal is admissible.

### *Article 123(2) EPC*

2. Main request and auxiliary request 1
  - 2.1 Claim 1 of these requests has been amended by replacing "method of improving turfgrass quality" in claim 1 as originally filed by "method of improving the density, uniformity **and** greenness of turfgrass" (emphasis added). It was undisputed that this requires the improvement of each of these three properties simultaneously.
  - 2.2 The respondent relied on page 7, lines 31-33 of the application as filed (i.e. of document (D1)) as a basis for this amendment. The respective paragraph reads as follows:

"Measurements were made at 1 week after treatments were applied. Turf quality was visually rated at the scale from 0 to 9 according to the density, greenness, and uniformity of the grass, with 0 being the worst and 9 being the best."
  - 2.3 The respondent took the view that this paragraph defined an improvement in turf quality as an improvement in all the three properties mentioned, as was confirmed by the declaration (D49); the appellant argued that this paragraph only mentioned that three properties were rated. An improvement in turf quality did not necessarily require an improvement in all three properties, as was apparent from example 1 I and figure 9 of document (D1) (see points VII and VIII above).

2.4 The paragraph cited under point 2.2. above has to be interpreted in the context of example 1 in which it stands. It describes how the test results "A. Turf quality" are obtained, which are depicted in Figures 1A and 1B (see (D1), page 8, lines 19-32). Said figures are graphs showing the "Turf quality" versus "Weeks of high temperature".

It is evident from said paragraph that all three properties, the density, greenness and the uniformity, have been rated in order to determine turf quality. Figures 1A and 1B do not show these three properties separately. This means that the comparisons drawn in the discussion of the results with reference to these drawings compare overall performances in turf quality and not the single ratings in density, greenness and uniformity.

2.5 The respondent relied on paragraph 5 of the declaration (D49) of Mr. Rufty, the first sentence of which reads as follows:

"I affirm in lieu of oath that the feature of "improving the density, uniformity and greenness" as used on page 7, lines 31 to 33 of the application as originally filed can only mean that the respective characteristics are improved simultaneously".

However, page 7, lines 31 to 33 of the application as filed (D1) does not mention the word "improving" or any expression having a comparable meaning (see under point 2.2. above). Therefore, the conclusions drawn in document (D49) are not based on the application as filed and cannot support the respondent's arguments concerning Article 123(2) EPC.

- 2.6 For the reasons mentioned above, the board concludes that claim 1 of the main request and of auxiliary request 1 contravenes the requirements of Article 123(2) EPC.

The board can decide on a request only as a whole. Therefore, the main request and auxiliary request 1 are found to contravene the requirements of Article 123(2) EPC.

3. Auxiliary request 2

3.1 Article 123(2) EPC

Claim 1 of this request is based on original claims 1 and 2 as well as page 2, line 25 of the application as originally filed. The reference to "method of improving the density, uniformity and greenness of turfgrass" which led to the rejection of the main request and of auxiliary request 1, was replaced by the wording of the original claim 1 ("method of improving ... turfgrass quality" in combination with a reference to the rating method disclosed on page 7, lines 31-33 of the application as filed. The board is thus satisfied that this claim meets the requirements of Article 123(2) EPC.

In view of the outcome of this decision it is neither necessary to give more detailed reasons nor to deal with the remaining claims of this request.

3.2 Clarity (Article 84 EPC)

- 3.2.1 Lack of clarity is no ground for opposition under Article 100 EPC. For this reason, a lack of clarity can

prejudice the maintenance of a patent in opposition appeal proceedings only if due to an amendment with respect to the claims as granted.

Claim 1 of auxiliary request 2 was amended by replacing "A method of improving the density, uniformity and/or greenness of turfgrass" in claim 1 as granted by "A method of improving the turfgrass quality, where the turfgrass quality is visually rated at the scale 0 to 9 according to density, greenness and uniformity of the grass with 0 being worst and 9 being best,". As this feature is not present in the claims as granted, the issue of whether this amended claim satisfies the requirements of Article 84 EPC needs to be decided upon (see G 9/91, point 19 of the reasons, OJ 1993, 408 and T 1469/10, point 2 of the reasons).

3.2.2 Whereas the granted claims required that at least one of the three properties was improved, the present claims are directed to a method for improving turf grass quality, where said quality is determined by visually rating these three properties. The present claims are silent as to how the parameter "turf grass quality" is to be determined from the ratings of the three properties, nor does the application as originally filed give an indication how said parameter is to be calculated. The argument of the respondent that the person skilled in the art would determine the turfgrass quality by calculating the arithmetic average of the ratings of the three properties was not supported by any evidence. The appellant brought forward that the person skilled in the art might give more weight on one or two of the three properties. This is in line with post-published document (D46). Table 3 of this document summarises the results of interviews with twelve university scientists. When asked what

component(s) of turfgrass quality they considered to be most important when conducting visual field assessment (VFAs), nine scientists considered uniformity and density to be most important (see question 3 in Table 3 on the fifth page and the abstract on the first page of the document). Hence it is equally possible that the skilled person might not consider turfgrass quality as the arithmetic average of the three properties but would give less weight to greenness. Such a weighted average may differ from the arithmetic average. Hence, depending on the way the turfgrass quality is determined from the ratings of the three properties - density, greenness and uniformity - the same treatment of the grass might in one case be considered to improve turfgrass quality whereas it might not show an improvement if the other method of calculation is used.

3.2.3 The respondent argued that the rating of the turfgrass quality gave reproducible results as the comparison was made with the closest prior art cited in the patent in suit. The respondent did not indicate which one of the three prior art patents disclosed in the patent in suit it was referring to in this argument.

Furthermore, the respondent relied on the fact that the appellant was able to rate the density, uniformity and greenness in its experiments disclosed in documents (D36), (D38) and (D39). The fact that the appellant was able to obtain reproducible results with regard to the closest prior art and to rate the three properties does, however, not exclude that its results would have been different with another rating scale.

3.2.4 For the reasons mentioned above, the amendment mentioned under point 3.2.1 renders claim 1 of

auxiliary request 2 unclear. Hence, this request does not satisfy the requirements of Article 84 EPC.

4. Auxiliary requests 3 to 13

Claim 1 of each of these requests also contains the amendment mentioned under point 3.2.1 above. The further modifications made in these claims do not specify further said amendment. Hence, the conclusion drawn under point 3.2.4 above also applies to claim 1 of each of these requests.

5. Summary

Claim 1 of the main request and auxiliary request 1 are found to contravene the requirements of Article 123(2) EPC. An amendment in each claim 1 of auxiliary requests 2 to 13 with respect to the claims as granted renders these claims unclear, contrary to the requirements of Article 84 EPC.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated